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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1951

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No. ~~324, Misc.~~

DAVID BROCK,
PETITIONER,

VS.

THE STATE OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI.

HARRY McMULLAN,
Attorney General,

RALPH MOODY,
Assistant Attorney General,

Counsel for the State of
North Carolina, *Respondent.*

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DAVID BROCK,
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VS.

THE STATE OF NORTH CAROLINA,
RESPONDENT.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

The petitioner, David Brock, seeks, by writ of *certiorari*, to have the Supreme Court of the United States review a decision of the Supreme Court of North Carolina affirming the judgment of the Superior Court of Edgecombe County, North Carolina, imposing sentence upon the petitioner for a conviction of the crime of assault with a deadly weapon. The opinion of the Supreme Court of North Carolina, filed October 31, 1951, is reported as STATE v. DAVID BROCK, 234 N. C. 390, 67 S.E. (2d) 282—Adv. Op. No. 3, November 29, 1951. (See Appendix, p. 13, where opinion of Supreme Court of North Carolina is set out in full.)

FACTS

At the regular term of the Superior Court of Edgecombe County held on October 17, 1949, the grand jury returned a true bill against the petitioner, David Brock, charging him with a secret assault with a deadly weapon with intent to kill. The petitioner was placed on trial, and the State proceeded with its case. During the progress of the trial and at the request of the Solicitor, the trial judge withdrew a juror and declared a mistrial. The trial judge made certain findings of fact which show that the Court was of the opinion that "the ends of justice require that this case not be completed and that a mistrial be ordered." (R. pp. 16, 17.)

The petitioner was then tried at the March Term, 1951 of the Superior Court, and when his case was called, he entered a plea of former jeopardy. (R. pp. 3 to 18.) The trial judge ruled that the facts set forth in the plea, taken to be true, are insufficient to sustain the plea and overruled and denied the same. (R. p. 18.) The Solicitor then announced that he would not ask for a verdict of guilty of secret assault but would ask for a verdict of guilty of assault with a deadly weapon. (R. p. 19.) The petitioner entered a plea of not guilty, and the trial was had.

The State introduced Alton Hathaway, who testified that on September 16, 1949, he and his wife spent the night at J. D. Wyatt's home, which is located four miles out on the Wilson Highway, west of Tarboro, North Carolina. (R. p. 19.)

For some time prior to this date, a strike had been in progress at the Hart Cotton Mills in said town. The petitioner in this case, along with the witness Hathaway and others, were on strike. J. D. Wyatt was a watchman at the plant and was not on strike.

Early on Wednesday morning, prior to the alleged assault on the following Friday, J. D. Wyatt went to the mill to go to work. As he approached the gate, he was met by Jim Cook and a number of strikers, who blocked his entrance to the mill. Cook told Wyatt that if he went into the mill the undertaker would have a job.

On the evening of Friday, the 16th, at about seven o'clock, the witness Hathaway returned from a picket tent in Tarboro to the home of his father-in-law, J. D. Wyatt. Hathaway testified that while at the tent he saw the petitioner Brock, Jim Cook and A. Q. Blackmon. (R. p. 21.) At about 9:30 that night, his wife fed the baby, and they went to bed. Shortly after the Hathaways had retired, he heard a car slow down as it passed his house. In a minute or so, the car came back. As it passed the house, he heard five rifle shots in quick succession. Four shots came through the window of the room in which Hathaway and his family were sleeping. (R. p. 20.) One bullet lodged within five feet of the bed, another bullet passed within 36 inches of their baby, another bullet passed on through the room and into the room occupied by Mr. Wyatt.

Mr. Wyatt and Mr. Hathaway went to the police station in Tarboro and reported the shooting. On the way back to Mr. Wyatt's house, they saw petitioner Brock's car going "on the same street that goes by J. D. Wyatt's house." (R. p. 21.) Later that night, petitioner Brock was taken to jail, and in the presence of the sheriff and other witnesses, and in the presence of one Matthews, Jim Cook made the statement that it was his rifle that was used in the shooting and that petitioner Brock actually did the shooting. Witness Cook stated to the sheriff, in the presence of petitioner Brock, that Brock helped plan the assault and that Brock "done the shooting." (R. p. 28.) Sheriff Bardin stated that after Cook made this statement, one Matthews agreed that it was correct, and petitioner Brock said, "I have nothing to say." (R. p. 32.)

It appears from the evidence that the petitioner Brock, as well as Wyatt, Hathaway, Matthews, Cook and others, were all out on a strike, but there was a difference of opinion among the strikers as to how the strike should be handled, and the petitioner Brock and the witness Wyatt, whose home was fired into, belonged to opposing factions of the employees out on strike.

ARGUMENT

I.

THE DENIAL OF PETITIONER'S PLEA OF FORMER JEOPARDY DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a State Court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by States.

BARRON v. BALTIMORE, 7 Pet. 243
U. S. v. LANZA, 260 U. S. 377, 67 L. ed. 314
BRANTLEY v. GEORGIA, 217 U. S. 284, 54 L. ed. 768
PHILLIPS v. McCAULEY, 92 Fed. (2d) 790 (C.C.A. 9)
FOX v. OHIO, 5 How. 434, 12 L. ed. 410, 434

The petitioner's brief thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

Compare:

U. S. v. RAGEN, (1950; C.C.A. 7), 181 Fed. (2d) 1001
AMRINE v. TINES, (1942; C.C.A. 10), 131 Fed. (2d) 827
PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288
MAXWELL v. DOW, 176 U. S. 581, 44 L. ed. 597

In U. S. v. RAGEN, *supra*, it is said, at p. 1003:

> "The only right under the federal Constitution of which the petitioner in the case at bar claims to be deprived is his right to be protected from double jeopardy. The sole specific reference in the United States Constitution to what is usually referred to as 'double jeopardy' is in the Fifth Amendment: '***.'

But the Fifth Amendment is not directed to the States and applies only to offenses against, and trials under, the laws of the United States, Palko v. State of Connecticut, 302 U. S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Phillips v. McCauley, 9 Cir., 92 F.2d 790.

* * * * * * * *

"The Supreme Court has considered the question whether the right granted in the Fifth Amendment to be not twice placed in jeopardy for the same offense is within the scope of the due process clause of the Fourteenth Amendment. In Palko v. State of Connecticut, 302 U. S. 319, 323, 58 S.Ct. 149, 151, 82 L.Ed. 288, the court stated: 'We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.'

"The court then held that the claimed double jeopardy there being considered was not a violation of the due process clause."

In AMRINE v. TINES, *supra,* it is said, at p. 833:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment, and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a State Court, the petitioner's plea of former jeopardy could only have raised questions concerning rights guaranteed him by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the petitioner was not twice

placed in jeopardy for the same offense in contravention of the North Carolina Constitution. Compare WHITE v. TEXAS, 310 U. S. 530. The decision on this point was, therefore, a decision of a State Court with respect to a question arising under the Constitution of the State. Such a question, the United States Supreme Court cannot review.

CRANE v. CAMPBELL, 245 U. S. 304, 62 L. ed. 304
DAVIS v. OHIO, 241 U. S. 565, 60 L. ed. 1172
GRAHAM v. WEST VIRGINIA, 224 U. S. 616, 56 L. ed. 917

II.

THE DECISIONS CITED BY PETITIONER DO NOT SUPPORT HIS POSITION ON THE CONSTITUTIONAL QUESTION HE IS ATTEMPTING TO PRESENT IN THIS APPLICATION.

The petitioner cites and relies upon PALKO v. CONNECTICUT, 302 U. S. 319, 82 L. ed. 288, and the petitioner in his brief (p. 22) states, with reference to the PALKO case: "Justice Cardozo states that the Fourteenth Amendment to the U. S. Constitution brings along, and makes applicable to states, the protections of the Fifth Amendment." It is quite apparent that the petitioner has misconceived the true holding of the Court in the PALKO case. A State statute permitted the State to appeal in a criminal case when such appeal was authorized by the trial judge, for correction of errors of law. The petitioner in the PALKO case had been convicted of murder in the second degree and sentenced to life imprisonment. On a State appeal, this was reversed, and upon retrial, the petitioner was convicted of murder in the first degree and sentenced to death. Palko contended that the second trial placed him twice in jeopardy for the same offense and, therefore, violated the Fourteenth Amendment. Palko contended that the prohibitions of the Fifth Amendment, for that matter he contended that all of the original bill of rights (Amendments I to VIII) had now been incorporated into the Fourteenth Amendment, and, therefore, the prohibitions

of the first eight Amendments by force of the Fourteenth Amendment made these same prohibitions applicable to the States. Actually Justice Cardozo said: "There is no such general rule." It was held in this case that Palko's second trial was consistent with due process of the law under the Fourteenth Amendment, and even if the situation presented in PALKO'S case might have been forbidden under the Fifth Amendment on the theory of double jeopardy, assuming a Federal trial was involved, the same rule would not apply to the States. After reviewing the various cases and pointing out certain prohibitions in the bill of rights that had been construed as being contained in the Fourteenth Amendment and certain other prohibitions in the bill of rights that had been construed as not being incorporated in the Fourteenth Amendment, Justice Cardozo said:

> "On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one. Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? Hebert v. Louisiana, supra. *The answer surely must be 'no'.*" (Emphasis supplied.)

The case of KEPNER v. U. S., 195 U. S. 100, 49 L. ed. 114 involved the application of a constitutional immunity provision of the Federal Constitution to the Philippine Islands. The case involved a construction of an act of the Congress and has no application to the Fourteenth Amendment as applied to the States. Mr. Justice Cardozo, on p. 322 of the opinion in the official report of the PALKO case, says that it was a Federal prosecution.

The petitioner cites certain Federal cases as follows: BERKOWITZ v. U. S., 93 F. 452; JARL v. U. S., 19 Fed. (2d) 891; U. S. v. WATSON, Fed. Cas. No. 16, 651; CARNERO v. U. S., 48 Fed. (2d) 69; EX PARTE ULRICH, 42 F. 587; U. S. v. KRAUT, 2 Fed. Supp. 16 and HUNTER v. WADE, 169 Fed. (2d) 973. We think it is sufficient to say that these were all cases that arose on Federal indictments

originally instituted in the Federal Courts, and in most instances involved constructions of the Fifth Amendment as applied to Federal cases and Federal rules. These cases do not constitute any authority whatsoever in considering indictments and convictions in State Courts where such convictions are attacked under the Fourteenth Amendment.

III.

THE SUPREME COURT OF NORTH CAROLINA DISPOSED OF THIS CASE ACCORDING TO THE RULES OF FORMER JEOPARDY PREVAILING IN THE STATE JURISDICTION.

In the opinion of the Supreme Court of North Carolina in this case (App. p. 13), the Court stated: "This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove*, 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice*, 201 N. C. 761, 161 S.E. 533." Mr. Justice Valentine took no part in the decision of the case, having been appointed to Associate Justice in September, 1951. The Chief Justice and the Associate Justices being evenly divided as to the competency of certain evidence, the judgment below was affirmed without becoming a precedent under the procedural rules of the Supreme Court of North Carolina.

In North Carolina, the trial Court has a right to withdraw a juror and declare a mistrial in both felonies and misdemeanors, the only difference being that in capital felonies, the necessity for the discharge is subject to review. In misdemeanor cases, the exercise of this power is entirely discretionary and is not subject to review by the Supreme Court. The petitioner in this case was convicted of a misdemeanor, but if it is said that the bill under which he was tried originally charged a felony, it was not a capital felony and is still subject to the same rule. In the case of STATE v. GUICE, 201 N. C. 761, 161 S.E. 533, the defendant was indicted for a felonious assault, inflicting serious injury not resulting in death and with intent to kill and murder his victim. This is a felony. The State

introduced evidence and rested its case, and counsel for the defendant made a motion for judgment as of nonsuit. Before ruling on the motion, the Court withdrew a juror and ordered a mistrial, and the authority of the Court to take this course of action was the question presented on appeal. The Supreme Court of North Carolina, in disposing of the matter, said:

> "In misdemeanors, and all cases of felonies not capital, the court below has the discretion to order a mistrial and discharge a jury before verdict in furtherance of justice and the court need not find facts constituting the necessity for such discharge, and ordinarily the action is not reviewable. In capital felonies the facts must be found and the necessity for such discharge is subject to review. *S. v. Bass,* 82 N. C., 570; *S. v. Andrews,* 166 N. C., 349; *S. v. Ellis,* 200 N. C., 77.
>
> "In the *Bass case, supra* (a felony), at p. 574-5, speaking to the subject, the Court said: 'We hold therefore on a review of the cases in our reports, that his Honor had the discretion to dissolve the jury and hold the defendants for a new jury, and that the security for the proper exercise of his discretion rests not on the power of this Court to review and reverse the judge, but on his responsibility under his oath of office.'"

In the case of STATE v. DOVE, 222 N. C. 162, 22 S.E. (2d) 231, the Supreme Court of North Carolina, on the same question, said:

> "The defendant was indicted for murder. However, at the solicitor's election he was not put on trial for first degree murder but for murder in the second degree or manslaughter. This was equivalent to taking a *nolle prosequi* on the capital charge. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387. At the close of the State's evidence defendant's motion for judgment as of nonsuit was denied. The solicitor then moved to be permitted to offer additional testimony. This motion was allowed, and, it appearing that the evidence desired was not presently available, the court ordered a mistrial, and continued the case. The defendant excepted to the ruling of the trial judge, and appealed to this Court.

"The ordering of a mistrial in a case less than capital is a matter in the discretion of the court. *S. v. Johnson*, 75 N. C., 123; *S. v. Upton*, 170 N. C., 769, 87 S. E., 328; *S. v. Ellis*, 200 N. C., 77, 156 S. E. 157; *S. v. Guice*, 201 N. C., 761, 161 S. E., 533; *S. v. Watson*, 209 N. C., 229, 183 S. E., 286. In capital cases only is the judge required to find the facts and place them on record so that upon a plea of former jeopardy the action of the court may be reviewed. *S. v. Tyson*, 138 N. C., 627, 50 S. E., 456; *S. v. Beal*, 199 N. C., 278 (295), 154 S. E. 604."

It is clear, therefore, that so far as State practice is concerned, the petitioner has no legal authority to support his position.

We also believe that the decisions of this Court sustain our view as to this feature of the law. See WADE v. HUNTER, 336 U. S. 684, 93 L. ed. 974; THOMPSON v. U. S., 155 U. S. 271, 39 L. ed. 146; SIMMONS v. U. S., 142 U. S. 148, 35 L. ed. 968.

IV.

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF CERTIORARI, FOR THE PETITIONER FAILED TO PROPERLY SET UP AND HAVE PASSED UPON BY THE LOWER COURTS A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES.

We have tried to show that the question or point relied on in the petition for writ of *certiorari* is not a Federal question of sufficient substance and importance to justify the issuance of a writ of *certiorari*. We now contend that this Court is without jurisdiction to allow the petition and grant the writ of *certiorari* because the petitioner did not properly set up and assign as error in the State Courts the constitutional question now presented.

While it is true that in his written motion, as shown on R. p. 5, that the petitioner alleged that his second trial would place him in jeopardy and violation of the Constitution of North Carolina and in violation of the Fifth

Amendment and Fourteenth Amendment of the Constitution of the United States, yet a careful examination of the record will show that the petitioner never did assert any rights on a constitutional basis. On R. p. 18, it will be seen how the plea of former jeopardy was disposed of in the trial Court. The prosecuting officer entered a general denial that the facts stated were sufficient to constitute former jeopardy. The Court ruled "that the facts set forth in the plea, taken as true, are insufficient to sustain the plea of former jeopardy, and overruled and denied same." The petitioner then merely entered an objection and reserved an exception. The petitioner then moved the Court to permit his plea of former jeopardy to be presented to and the facts to be passed on by the jury. This was overruled, and the petitioner excepted. On R. p. 19, the petitioner states his exception as follows: "The foregoing exception to the Court's overruling of his plea of former jeopardy constitutes the defendant's Exception No. 1." The petitioner again stated his exception as follows: "The foregoing exception to the Court's denial of the motion that the Court permit his plea of former jeopardy to go to the jury, and that the facts be passed on by the jury constitutes defendant's Exception No. 2."

It will thus be seen that the petitioner nowhere urged the trial Court to pass upon any constitutional issue or question. When the petitioner assigned his errors in the record (R. p. 36) to be passed upon by the Supreme Court of North Carolina on this point, he assigned them as follows:

"GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

"ASSIGNMENT OF ERROR 1. The defendant assigns as error the Trial Court's overruling as a matter of law, assuming the truth of all facts therein set forth, the defendant's plea of former jeopardy, and in overruling the defendant's motion that the jury be permitted to pass upon the issues of fact, as shown by EXCEPTIONS 1 and 2 (R p 19)."

It will thus be seen that the Supreme Court of North Carolina was never requested or called upon to pass on

this question of former jeopardy in relation to the Fourteenth Amendment of the Federal Constitution.

Under the statute authorizing review by *certiorari* of decisions of the highest Courts of the several States, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U.S.C.A., § 1257

The rights, privileges, or immunities must be set up in the State Courts.

BROOKS v. MISSOURI, 124 U. S. 394, 31 L. ed. 454
HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed. 722

CONCLUSION

The questions set out in the petition are not Federal questions, or, if they are, the questions are not substantial and are not of sufficient importance to warrant consideration by the United States Supreme Court. None of these questions were properly set up in the State Courts as questions arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

HARRY McMULLAN,
Attorney General,

RALPH MOODY,
Assistant Attorney General,

Counsel for the State of
North Carolina, *Respondent.*

APPENDIX

STATE v. DAVID BROCK

(Filed 31 October, 1951)

APPEAL by defendant from *Harris, J.*, March Term, 1951, of EDGECOMBE. Affirmed.

The defendant was indicted for secret assault on J. D. Wyatt and several others, 16 September, 1949 (G. S. 14-31.)

There was verdict of guilty of assault with a deadly weapon, and from judgment imposing sentence defendant appealed, assigning error in the denial of his plea of former jeopardy and in the admission of certain testimony.

Attorney-General McMullan, Assistant Attorney-General Moody, and Charles G. Powell, Jr., Member of Staff, for the State.

Robert S. Cahoon for defendant, appellant.

DEVIN, C. J. This Court is of the opinion unanimously that defendant's plea of former jeopardy was properly denied. *S. v. Dove,* 222 N. C. 162, 22 S.E. 2d 231; *S. v. Guice,* 201 N. C. 761, 161 S.E. 533. But the members of the Court are evenly divided in opinion (*Justice Valentine* not sitting) whether error in the admission of testimony as to declarations and conduct of Jim Cook in the absence of the defendant was prejudicial requiring a new trial. Hence the judgment of the Superior Court must stand affirmed, without becoming a precedent.

Judgment affirmed.

VALENTINE, J., took no part in the consideration or decision of this case.

BARNHILL and JOHNSON, JJ., dissent for the reason they are of the opinion the defendant is entitled to a new trial for error in the admission of evidence of conduct and declarations of Jim Cook.